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UNITED STATES DEPARTMENT OF JUSTICE
BEFORE THE ATTORNEY GENERAL

In re:	File No.: A 73 753 922
	San Francisco
Rodi ALVARADO-PENA	
Respondent	
In Deportation Proceedings.	

DEPARTMENT OF HOMELAND SECURITY'S POSITION ON RESPONDENT'S ELIGIBILITY FOR RELIEF

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I. SUMMARY OF THE ARGUMENT

This case presents the issue of whether the applicant may qualify for asylum based on her fear of domestic violence. More specifically, this case raises the question whether the applicant's fear of domestic violence may establish a well-founded fear of persecution on account of membership in a particular social group. The Department of Homeland Security (DHS) argues that, under some limited circumstances, a victim of domestic violence can establish eligibility for asylum on this basis, and that the applicant in this case has established such eligibility.[1]

Based on the particularly horrendous abuse suffered by the applicant and the very unusual facts and exceptional circumstances in this case, DHS argues that the applicant, Alvarado, has met the statutory requirements for asylum. Further, DHS argues that there are no adverse factors that would warrant denial of asylum, and that the Attorney General should grant asylum in this case. In light of the fact that both parties agree that Alvarado is eligible for and should be granted asylum, DHS believes the case is moot and moves the Attorney General to remand this case to the Board with instructions to summarily grant asylum to the alien with the following language: "Pursuant to the order of the Attorney General, the alien is granted asylum under section 208 of the Act." The instructions to the Board should make clear that the Board is not to summarily affirm the IJ's decision.[2] The facts of this case, however, do not offer an

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[1] Note: Canada, the United Kingdom, Australia, and New Zealand have all recognized asylum claims based on domestic violence. CRDD T98-02494, Ma, Tahiri, September 7, 1999 (reasons signed October 7, 1999). (RefLex Issue 129 December 22, 1999 REFUGEE DIVISION) (Canadian IRB); Islam (A.P.) v. Sec. of State for the Home Dep't, 2 App. Cas. 629 (H.L. 1999) (United Kingdom) (British House of Lords); Khawar v. Minister for Immigration and Multicultural Affairs, (1999) FCA 1529 (Federal Court of Australia); Refugee Appeal No. 71427/99 (16 August 2002) (New Zealand Refugee Status Appeals Authority).

[2] DHS's position that the alien is eligible for and should be granted asylum does not signify any agreement with the opinion or the analysis issued and engaged in by the Immigration Judge who heard this case. DHS believes that the Immigration Judge's articulation of the particular social group to which the respondent belonged was fundamentally flawed.

appropriate vehicle for developing the kind of comprehensive administrative interpretive approach needed for the adjudication of particular social group cases. Such guidance would be provided far better through the rule making process. DHS, working cooperatively with the Department of Justice (DOJ), plans to finalize promptly the proposed regulations that would govern the analysis of these types of cases. Therefore, DHS asks the Attorney General to instruct the Board to grant asylum in this case without issuing an opinion, as outlined above, so as not to prejudice the rulemaking process.

Rulemaking is the best process through which DHS can share its expertise in asylum law and policy and its experience in administering and adjudicating social group asylum claims. For example, a rule can provide the kind of general guidance that will allow social group definitions to be tailored narrowly, so that they yield the most appropriate analysis of the facts in individual cases. Such guidance is crucial to correctly and precisely identify the reason why the persecutor targets the victim, to properly assess whether that reason qualifies as one protected under the refugee definition, and to avoid the kinds of overbroad social group definitions that have confused the analysis of cases in the past. Thus, the law would best be developed by setting out guidance in a generally applicable rule, rather than by issuing a precedent decision analyzing the facts of a specific case.

In the alternative of instructing the Board to grant asylum without an opinion, DHS respectfully moves the Attorney General to postpone issuing his decision in this case until the final regulation is published. Once such regulations are finalized, DHS urges the Attorney General to apply them to the facts of this case and to grant asylum.

If the Attorney General chooses to decide this case in a precedent decision before the regulations are finalized, DHS requests the Attorney General to grant asylum. DHS urges,

however, that such a decision be narrowly tailored and limited as much as possible to the particular facts of this case, to allow development of the applicable law through the rule-making process.. A decision which permits too expansive a reading of the term "particular social group" could have a significant adverse operational impact. Shared descriptive characteristics cannot by themselves constitute a particular social group. See Castellano-Chacon v. INS, 341 F.3d 533, 548 (6th Cir. 2003) ("As a category, tattooed youth do not share an innate characteristic, nor a past experience, other than having received a tattoo . . . .). In other cases, applicants have argued social groups based on criminal or anti-social behavior. See, e.g., Bastanipour v. INS, 980 F.2d 1129 (7th Cir. 1992) (holding drug traffickers are not a particular social group); In Re M-O-, BIA Dec. (April 7, 2000) (unpublished) (rejecting claim that men who have deflowered virgins engaged to other men form a social group); cf. Castellano-Chacon, 341 F.3d at 549 (recognizing that an applicant could argue that members of a gang form a particular social group). It is essential that the compelling factors present in this case not hinder the law interpreting the term "particular social group" from developing in a coherent and controlled manner.

II. ANALYSIS OF THIS CASE IN THE ABSENCE OF A FINAL RULE

A final rule is the best vehicle for providing much needed guidance on the adjudication of particular social group asylum claims, including those based on domestic violence. The legal standards governing this case and others like it have been obscured by the uneven development of case law and by the need for a coherent administrative framework for interpretation on these issues. To address this problem, the Department of Justice (DOJ) issued a proposed rule on December 7, 2000. 65 Fed. Reg. 76,588 (Dec. 7, 2000). Rather than allowing further piecemeal development of this area, the proposed rule announced a uniform administrative

interpretation of the law on key issues that often arise in social group cases. While the claim in this case would be grantable under the analytical framework set out in the rule, the rule itself does not address domestic violence per se. Instead, the focus is on providing a rational and uniform framework for assessing complicated questions about persecution, motivation, and state protection, and for ensuring that all the other requirements for asylum are addressed in these types of cases. DHS believes that a rule codifying generally applicable principles that are drawn from established concepts of asylum law is the best way to provide much needed clarity for particular social group cases, including claims based on domestic violence.

This rule is now under DHS jurisdiction, and DHS plans to finalize it promptly, in cooperation with DOJ. DHS expects that the final rule will represent the conclusion that, under current law, it is possible for some limited number of victims of domestic violence to establish that the harm they suffered or fear is on account of membership in a particular social group, or for that matter, on account of another protected ground if the facts support such a claim. This does not mean, however, that every victim of domestic violence would be eligible for asylum. As in any asylum claim, the full range of generally applicable requirements for asylum must be satisfied. See Matter of Acosta, 19 I&N Dec. 211, 219 (BIA 1985) (identifying the "separate elements that must be satisfied" for an applicant to meet the refugee definition and establish asylum eligibility), modified on other grounds, Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987); cf. Fisher v. INS, 79 F.3d 955, 961 (9th Cir. 1996) (characterizing an asylum seeker's evidentiary burden on appeal as a "heavy one").

For example, first, the harm feared must be serious enough to be persecution, see Fisher, 79 F.3d at 961 ("Persecution is an extreme concept"), and second, the fear of future harm must be well-founded, see generally INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (discussing and

clarifying well-founded fear standard). Third, asylum may be denied where the applicant has the reasonable option of avoiding abuse by relocating within the home country. See, e.g., Cardenas v. INS, 294 F.3d 1062, 1066 (9th Cir. 2002); 8 CFR §§208.13(b)(1)(i)(B), (b)(2)(ii) and (b)(3). Fourth, as in any asylum case in which the persecutor is not the state itself, the applicant would have to show that the state is unwilling or unable to protect her. See Llana-Castellon v. INS, 16 F.3d 1093, 1097-98 (10th Cir. 1994); Navas v. INS, 217 F.3d 646, 655-56 (9th Cir. 2000).

Under the rule as DHS plans to finalize it, the applicant in this case would be eligible for asylum. As stated above, DHS urges the Attorney General to order the Board to grant asylum without an opinion, or wait for promulgation of the final rule before deciding this case. If the Attorney General chooses to decide this case in a precedent decision before the rule is finalized, however, DHS argues that the case should be analyzed as follows, which is consistent with existing law.

In order to be eligible for asylum, an applicant must establish that she has suffered or has a well-founded fear of suffering persecution on account of her race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. §§ 1101(a)(42) & 1158; Immigration and Nationality Act (INA) §§ 101(a)(42) and 208; INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992). Of the five statutory grounds for asylum, the meaning of membership in a particular social group is perhaps the least well defined and the most robustly debated. In recent years, gender-related claims based, for example, on female genital mutilation (FGM) or domestic violence, have often been raised under the social group ground. See, e.g., Aguirre-Cervantes v. INS, 242 F.3d 1169, vacated in, 270 F.3d 794 (9th Cir. 2001); Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996). These claims can raise difficult analytical questions, not only about the meaning of the social group ground itself, but also about other aspects of the asylum standard, such as the

meaning of persecution, the requirement that persecution be inflicted "on account of" a protected ground, and the availability of state protection.

Whether the Attorney General decides this case before or after the particular social group rule is finalized, DHS believes that the questions in this case should be resolved by rigorously analyzing each element of the applicant's claim under the applicable legal standards. While these questions may arise in different and unfamiliar ways in the context of a claim based on domestic violence, they are in fact the same questions that are asked in every asylum case. To arrive at a fair and correct outcome in this case, Matter of R-A- must be analyzed as any other case, element by element, under the existing, generally applicable principles of asylum law that will be codified by the final rule.

III. HISTORY OF THE CASE

This case has a long and unusual procedural history and is significant because it highlights a number of important, unresolved issues of asylum law interpretation. Rodi Alvarado Pena is a national of Guatemala who requested asylum and withholding of deportation before an Immigration Judge in 1995. She based her application for asylum on the severe domestic violence she suffered in Guatemala at the hands of her husband and on her fear that such violence would continue if she were to return there. The Immigration Judge found Alvarado's testimony credible and granted asylum.

The Immigration and Naturalization Service (INS) appealed this decision to the Board of Immigration Appeals (Board). In a 1999 precedent decision, the Board agreed that Alvarado was credible, but concluded that she was not eligible for asylum and withholding. Matter of R-A-, 22 I. & N. Dec. 906 (BIA 1999), vacated and remanded (A.G. 2001). The Board therefore reversed the Immigration Judge's decision, denied asylum, and granted 30 days voluntary departure.

The INS had originally argued, both before the Immigration Judge and before the Board, that Alvarado did not qualify for asylum. After the Board decided the case consistent with the original INS arguments, however, the INS re-examined the case and concluded that the Board's analysis of several issues was problematic. DOJ agreed. In 2000, DOJ published the proposed rule setting out standards for the analysis of these issues. As noted above, under the analytical framework set out in the proposed rule, it would be possible for victims of domestic violence to be granted asylum under certain limited circumstances. On January 19, 2001, the Attorney General vacated the Board's 1999 decision and remanded the case to the Board with instructions to decide it after the rule was finalized. The proposed rule has not been finalized and is now under the jurisdiction of DHS. In February 2003, the Attorney General certified Matter of R-A- to himself to decide pursuant to 8 C.F.R. § 1003.1(h)(1)(i). On December 8, 2003, the Attorney General ordered briefing on Alvarado's eligibility for "relief under the Immigration and Nationality Act."[3] A.G. Order No. 2696-2003 (not published in the Federal Register).

IV. STATEMENT OF FACTS

In 1984, at the age of 16, Alvarado married Francisco Osorio, a Guatemalan army soldier. They knew each other only a short time before they were married. Immediately after they were married they moved from Alvarado's hometown of Jutiapa, Pascao Province to Guatemala City, where here husband worked. Exhibit 2a at 2. The applicant testified that following their marriage in 1984, her husband seriously abused her on almost a daily basis for over a decade, until she fled Guatemala in 1995. Exhibit 2a at 5.

[3] Respondent has also sought protection under the Convention Against Torture (CAT). On September 2, 1999, she moved the Board to reopen and remand to the IJ to seek such protection. On September 15, 1999, the INS filed an opposition to that motion. That motion remains pending with the Board. Because DHS concludes that respondent is eligible for asylum, it is not necessary to consider her application for protection under CAT.

The applicant testified that the Guatemalan army has tremendous authority and that her husband would tell her stories of how he and other soldiers exercised that authority. He bragged about how he and other soldiers tossed a baby in the air and shot at it as if they were shooting skeet. After shooting, they left the baby there. He told stories of rolling people inside mats, dousing the mats with gasoline, and burning the people alive. Tr. at 18-23; Exhibit 2a at 2-3. Osorio made it clear to Alvarado that he had killed a lot of people when he was in the army and that he would not hesitate to do the same to her. Tr. at 23.

From the beginning of the marriage Osorio was extremely controlling and engaged in acts of extreme physical and sexual abuse against Alvarado. Tr. at 28. Alvarado testified that Osorio saw her "as something that belonged to him and he could do anything he wanted" to her. Tr. at 135. Osorio insisted that Alvarado accompany him at all times, except when he was working, and he escorted her to work and back. In the evenings when he went to cantinas she was required to sit with him and could not leave without him. When she attempted to leave the cantina before him he would strike her or otherwise physically restrain her from leaving. Exhibit 2a at 3-4. This domineering behavior escalated into more extreme forms of violence and control. Once when Alvarado's menstrual period was 15 days late he dislocated her jawbone. Exhibit 2a at 4. When she refused to abort her pregnancy in the second trimester, he kicked her violently in the spine. Exhibit 2a at 4; Tr. at 26. Alvarado testified that "(a)s time went on, he hit me for no reason at all." Exhibit 2a at 4. Tr. at 24, 26, 35. Osorio also at various times dragged her by her hair nearly pushed out one of her eyes, used her head to break windows and mirrors, whipped her with pistols and electrical cords, and threatened her with knives. Ex. 2a at7-9; Tr. at 23, 27, 32, 44.

Osorio accused the respondent of seeing other men and threatened her with death. When she came home from work he would demand her underpants and then he raped her almost daily, often beating her during this unwanted sex. The repeated rapes made it so that her abdomen ached constantly. Exhibit 2a at 5. Once Osorio kicked Alvarado in the genitalia so severely that it caused internal bleeding and extreme pain. The doctor who treated Alvarado for this injury told her that another blow could damage her womb and ovaries. Since receiving that injury Alvarado's period has been very irregular. Exhibit 2a at 5-6. In addition to this horrendous abuse Osorio also forcefully sodomized Alvarado, causing her severe pain and suffering. Tr. at 29. When she protested, he responded by saying, "You're my woman, you do what I say." Exhibit 2a at 6.

Alvarado tried to escape the abuse on several occasions. She ran away to her brother's and parent's homes several times, but her husband located her and forced her to return home each time. Tr. at 34 and 37. In 1994, Alvarado escaped with her two children and rented a room in the outskirts of the city. She and the children stayed in that room for two months, but Osorio once again located them. When he found them he beat Alvarado into unconsciousness and then "persuaded" her to return home. Tr. at 38-39; Exhibit 2a at 6-7. Respondent's affidavit explains that Osorio told her that she can not leave him, or that "you [she] will suffer much worse than what I have done to you [her] so far." Ex. 2a at 14. Likewise, Osorio told her:

> If you ever try to leave, I will come find you. And when I find you, I could kill you, but I'm not going to do that. I will break your legs. I will cripple you so that you will be in a wheel chair for the rest of your life. I will mark your face so it will be scarred forever, it will be twisted and deformed.

Id. Other times he told her that, if she ever left him, he would find her and kill her. Id. Respondent, in commenting upon her impressions of Osorio's intent, stated:

> [E]ven if I wanted to live my life alone, he would not let me. I would not be free to go anywhere; he would track me down. With his connections in the military and security he would find me. He found me before when I tried to move away; he would again. And I know that, once he found me, he would beat me worse than ever before for having left him.

Id. Similarly, respondent testified that Osorio told her "you can't hide, even if you are buried under ground, you can't hide from me. I don't care what you do, you can't get away. Go ahead, try to disappear, and I will cut off your legs so you can't get away any more." Ex. 2a at 8.

Upon returning home the abuse continued and escalated. One night when Alvarado was sleeping, Osorio dragged her out of bed by the hair, struck her with an electrical cord, and said, "Let's go for a walk." When she refused he pulled out his machete and stated, "What would you do if I stuck this knife in your neck?" He said, "Just you wait, you can't hide, even if you are buried underground, you can't hide from me. I don't care what you do, you can't get away. Go ahead try to disappear, and I will cut off your legs so you can't get away anymore." Exhibit 2a at 8. Another time Alvarado's husband assaulted her with a machete. She was seated in the kitchen with her hands on the table when her husband entered the room in a rage and threw his machete at her hands. She moved her hands just in time and the knife hit the table where her hands had been. If she had not moved he would have cut off both of her hands. Tr. at 48; Exhibit 2a at 9.

In desperation, Alvarado attempted suicide. She took a large number of pills, but was taken to the hospital and the pills were flushed out of her system. Her husband was present when she attempted suicide. He told her, "If you want to die, go ahead. But from here, you are not going to leave." Exhibit 2a at 9-10. Alvarado testified that she had decided that God did not yet mean for her to die, but she knew that the only way she could escape Osorio was to die or flee.

Alvarado testified about at least 5 separate occasions when she reported the abuse to the police, trying unsuccessfully to get them to intervene. Although the police took her complaints on several occasions, they never took any action on them and Alvarado never received any assistance or protection. Tr. at 127. When she called the police in the midst of an incident, they never responded to the scene. Exhibit 2a at 11. When she went to the police seeking protection from her husband, they did nothing to assist her and instead told her that they would not get involved because it was something that should be taken care of at home. Tr. at 130. One complaint was referred to a judge, but when Alvarado asked the judge for protection from her husband the judge declined to intervene, stating that this was a domestic matter that should be settled at home. Her husband was never even required to appear in court. Tr. at 42. Alvarado's husband repeatedly told her that going to the police was useless because he had many military and police friends across the country. Tr. at 43; Exhibit 2a at 10-11.

Unable to obtain protection from the authorities and fearing for her life, Alvarado fled Guatemala in 1995. Since fleeing Guatemala, Alvarado learned from her sister that her husband has stated that he is "going to hunt her down and kill her if she comes back to Guatemala." Exhibit 3D.

V. DECISION OF THE BOARD

Both the Immigration Judge and the Board found that Alvarado credibly testified to a staggering history of escalating abuse. In summarizing the violence, the Board noted that it struggled to describe how deplorable it found her husband's conduct to have been. No decision maker in this case has questioned Alvarado's veracity, the atrociousness of the abuse she suffered from her husband, or the reasonableness of her fear that the abuse would continue if she

returned to Guatemala. The Board concluded, however, that the harm at issue in this case failed to meet the statutory requirements for a grant of asylum.

To qualify for asylum under United States law, an applicant must show that the persecution she fears is on account of race, religion, nationality, membership in a particular social group, or political opinion. In order for an applicant to be at risk "on account of" one of these characteristics, there must be evidence that the persecutor seeks to harm the victim because of the victim's possession of the characteristic at issue. See Elias-Zacarias, 502 U.S. at 482-83.

The Board addressed alternative claims of persecution on account of political opinion (the applicant's opposition to male domination) and on account of membership in a particular social group (defined as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination"). The INS initially argued to the Board, and the Board found, that Alvarado's husband did not seek to harm her either on account of her political opinion or on account of her membership in a particular social group.

A. Decision of the Board on Alvarado's political opinion claim

DHS agrees with the Board's determination on the political opinion claim. The Board's analysis on this point is consistent with long-standing principles of asylum law. The Board reasoned that the abuse in this case was not on account of the applicant's political opinion because there was no evidence that the husband was aware of the applicant's opposition to male dominance, or even that he cared what her opinions on this matter were. Rather, he continued to abuse her regardless of what she said or did. This portion of the decision does not open new lines of reasoning and should not be disturbed. It is consistent with the Supreme Court's reasoning in Elias-Zacarias. It is also consistent with the Board's long-standing approach that

harm is not on account of political opinion when it is inflicted *regardless* of the victim's opinion rather than *because of* that opinion. Matter of Chang, 20 I&N Dec. 38 (BIA 1989), superseded on other grounds, Matter of X-P-T-, 21 I&N Dec. 634 (BIA 1996).

There may be, of course, cases involving harm inflicted within the context of a domestic relationship where other grounds, such as religious or political opinion, are implicated. See, e.g., In re S-A-, 22 I&N Dec. 1328 (BIA 2000). In this case, however, it would be fundamentally inaccurate to characterize Alvarado's abuse as motivated by her husband's perception of her political opinions about male dominance. The Board was correct in its reasoning on this issue.

B. Decision of the Board on Alvarado's particular social group claim

The Board's analysis of the particular social group claim, however, is problematic. The Board rejected Alvarado's arguments that the abuse she suffered and feared was on account of her membership in a particular social group defined as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination." The Board found that this formulation did not qualify as a particular social group.

The Board correctly concluded that this articulation of the social group is faulty. By describing the group as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination," the Immigration Judge essentially defined the group by the harm the applicant fears. Case law makes clear that this type of circular reasoning does not establish the existence of a particular social group for purposes of asylum law. See, e.g., Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991) (rejecting particular social group of women who had been battered and raped by Salvadoran guerillas); see also Lukwago v. Ashcroft, 329 F.3d 157, 172 (3rd Cir. 2003) ("We

agree that under the statute a 'particular social group' must exist independently of the persecution suffered by the applicant for asylum.").

The facts of this case, however, give rise to other articulations that would both meet the requirements for a particular social group and accurately identify the reason Alvarado's husband harmed her. For example, in her closing arguments to the Immigration Judge, Alvarado asserted that it was because of her status as a married woman that she was harmed. TR 150. The record strongly supports such a conclusion. DHS argues that the social group in this case would more accurately be defined as "married women in Guatemala who are unable to leave the relationship," and that such a formulation would meet the requirements for a particular social group.

The Board also decided that, in any event, the abuse in this case was not "on account of" the applicant's membership in the group asserted. The Board concluded that there was no indication that the applicant's husband would harm any other member of this group. In other words, there was no evidence that he would seek to harm other women who live with other abusive partners. This reasoning was crucial to the Board's determination that it was not because of the respondent's membership in the group that her husband would harm her.

These two determinations, that a particular social group does not exist and that the abuse in this case was not on account of the asserted group in any event, are the heart of the Board's decision and together form the basic conceptual obstacles to granting asylum in this case as well as in other cases involving domestic violence.[4] For reasons described below, DHS argues that the Board's analysis on these two issues is flawed and, if reinstated as precedent, would impede rational, coherent development of particular social group law. In addition, because these issues

[4] Of course, as noted above, there may be cases where harm is inflicted in the context of a domestic relationship on account of grounds other than membership in a particular social group. The Board's reasoning in Matter of R-A- would not preclude the granting of asylum in such cases. See, e.g., Matter of S-A-, 22 I&N Dec. at 1328.

must be addressed in the adjudication of all asylum claims, retention of the Board's flawed analysis would undermine clarity, consistency and fairness in the administration of asylum law in general.

VI. STATEMENT OF THE LAW AND ARGUMENTS

In order to engage in a balanced analysis of the complicated issues in this case, it is necessary to assess each element of the claim seriatim under current law. In this section DHS will outline the relevant legal standards governing each aspect of the asylum adjudication, apply those standards to the facts of this case, and demonstrate that Alvarado has established eligibility for asylum.

A. Persecution

1. Statement of the law

There is no universally accepted definition of persecution in statute, regulation or case law. Rather, the determination whether the harm feared in a given case amounts to persecution is made case by case, with reference to guidance from the jurisprudence that is relevant to that case. See Manzoor v. United States Dep't of Justice, 254 F.3d 342, 346 (1st Cir. 2001).

The Supreme Court has held that "persecution" is a broader concept than "threats to life or freedom." INS v. Stevic, 467 U.S. 407, 428 n.22 (1984). The United Nations High Commissioner for Refugees (UNHCR) takes a similar approach, explaining that a threat to life or freedom, or other serious violation of human rights, will always constitute persecution.[5] Rape

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[5]UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, para. 51 (1992) (Handbook). Although the Handbook is not legally binding, it "provides significant guidance in construing the Protocol to which Congress sought to conform." INS v. Cardoza-Fonseca, 480 U.S. at 439, n.22.

and other severe sexual harm have also been found to constitute persecution. See, e.g., Angoucheva v. INS, 106 F.3d 781 (7th Cir. 1997).

2. The harm Alvarado fears amounts to persecution

Under existing guidance the level of harm Alvarado fears is clearly high enough to amount to persecution. Alvarado testified that following their marriage, her husband seriously abused her on a daily basis for over a decade until she fled Guatemala in 1995. Alvarado testified that the physical abuse was severe. Osorio dislocated her jaw, nearly pushed out her eye, tried to cut off her hands with his machete, kicked her in the abdomen and vagina, and tried to force her to abort when she was pregnant with her second child by severely kicking her in the spine. He dragged her by her hair, used her head to break windows and mirrors, whipped her with pistols and electrical cords, and threatened her with knives. The Immigration Judge and the Board both concluded that the harm Alvarado suffered and fears amounts to persecution. DHS does not dispute that the harm in this case amounts to persecution.

B. Well-foundedness

1. Statement of the law

An asylum applicant may establish that she is a "refugee" by proving either that she has experienced persecution on account of a protected ground in the past, or that she has a well-founded fear of suffering such persecution in the future. 8 U.S.C. § 1101(a)(42)(A), INA § 101(a)(42)(A). For an asylum applicant who has established past persecution, however, the question of whether the applicant continues to have a well-founded fear remains relevant because asylum law is generally protective and not compensating, and regulations limit the circumstances

under which discretion can be exercised to grant asylum based on past persecution alone. 8 C.F.R. § 208.13(b)(1)(i) (2003); Matter of N-M-A-, 22 I&N Dec. 312 (BIA 1998).

Under the existing regulatory standard, in order to establish a well-founded fear of persecution, an applicant must establish that 1) she has a fear of persecution in the home country, 2) there would be a reasonable possibility that she would suffer such persecution if returned there, and 3) that she is unwilling to return to, or to avail herself of the protection of, that country, because of such fear. Id. § 208.13(b)(1)(iii).

2. Alvarado's fear of persecution is well-founded

Under this regulatory standard, Alvarado has established that her fear of persecution is well-founded. She has credibly testified to her subjective fear of persecution should she return to Guatemala. She has produced persuasive evidence that she suffered serious harm in the past and that there is at least a reasonable possibility that she would continue to suffer such harm there in the future. She has also shown that she is unwilling return to, or to avail herself of the protection of Guatemala because of her fear. In fact, the Immigration Judge concluded that Alvarado's fear was well-founded, and the Board did not disturb this conclusion. DHS agrees that Alvarado's fear is well-founded and urges the Attorney General to so decide.

C. Existence of a particular social group

The Board decided that the Immigration Judge's formulation of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" does not qualify as a particular social group, and DHS agrees. The Board specifically declined to address whether other formulations of the group presented by Alvarado, such as "Guatemalan women" or "battered spouses" would constitute particular social

groups. It is critical, however, to identify and assess the most appropriate particular social group for this case. DHS argues that "married women in Guatemala who are unable to leave the relationship" is the proper social group formulation in this case. Under the best reading of existing legal standards, "married women in Guatemala who are unable to leave the relationship" is a particular social group and Alvarado is a member of that group.

1. Statement of the law

There has been relatively little guidance in asylum jurisprudence that is directly applicable to gender-related particular social group claims, especially those involving domestic violence. The dominant line of reasoning in United States decisional law interpreting the social group ground is best represented by Matter of Acosta, 19 I&N Dec. at 211. The Acosta-based line of reasoning is sound and well supported. Other aspects of social group law, however, have developed unevenly and sometimes inconsistently.

In Acosta, the Board articulated the "immutable characteristic" test for determining whether a particular social group exists. The Board found the doctrine of *ejusdem generis* (the rule of construction that a general term included in a list of particular terms should be interpreted consistent with the general nature of the enumerated items) "to be most helpful in construing the phrase 'particular social group.'" The Board reasoned:

> The other grounds of persecution in the Act and the Protocol listed in association with "membership in a particular social group" are persecution on account of "race," "religion," "nationality," and "political opinion." Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that is either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.... "[P]ersecution on account of membership in a particular social group ... mean[s] persecution that is directed toward an individual who is a member of a group of persons all of whom share a common immutable characteristic.... Whatever the common characteristic that defines the group, it must be one that the members of

> the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

Id. at 233; see also Matter of H-, 21 I&N Dec. 337 (BIA 1996).

Under this approach, gender is clearly an immutable trait. Indeed, Acosta actually lists gender as such a trait. Further, there may be circumstances in which a woman's marital status should be considered immutable. When an individual's religious or moral convictions dictate that marital status is a fundamental attribute of one's identity, that individual should not be required to change marital status. Further, even accepting the premise that one should be required to change marital status to avoid persecution, there may be circumstances in which it would be impossible to do so, such that the characteristic would be immutable for that reason. This would appear to be the case, for example, if a woman could not reasonably be expected to divorce because of religious, cultural or legal constraints, or because evidence indicates that her husband would not recognize a divorce or separation as ending the relationship.

Most U.S. jurisprudence has followed Acosta.[6] Several circuits have interpreted the Board's holding in Acosta as recognizing family as a particular social group, confirming that an individual's status within a domestic relationship is within the realm of characteristics that may define a social group. Gebremichael v. INS, 10 F.3d 28, 36 (1st Cir. 1993) ("There can, in fact,

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[6] Following Acosta, many courts have found (or suggested) a variety of particular social group formulations. See, e.g., Hernandez-Montiel v. INS, 225 F.3d 1084, 1087 (9th Cir. 2000) ("[G] ay men with female sexual identities in Mexico constitute a 'particular social group' and . . . Giovanni is a member of that group. His female sexual identity is immutable because it is inherent in his identity; in any event, he should not be required to change it."); Lwin v. INS, 144 F.3d 505, 512 (7th Cir. 1998) ("When the Acosta formulation is applied to the facts of this case, we conclude that parents of Burmese student dissidents do share a 'common, immutable characteristic' sufficient to comprise a particular social group. But that element is only the first of three that May must establish. May must also satisfy the critical third element: he must show that he has a well-founded fear of persecution for being the parent of a student dissident. We . . . remand this case for a more careful examination of the extent to which parents of Burmese student dissidents could be exposed to persecution.") (citation omitted); Fatin v. INS, 12 F.3d 1233, 1241 (3d Cir. 1993) (claimed group — "Iranian women who refuse to conform to the government's gender-specific laws and social norms" — "may well satisfy" Acosta's definition of a particular social group, "for if a woman's opposition to the Iranian laws [such as the requirement of wearing the chador] is so profound that she would choose to suffer the severe consequences of noncompliance, her beliefs may well be characterized as 'so fundamental to [her] identity or conscience that [they] ought not be required to be changed.' ") (citation omitted).

be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family. Indeed . . . we recently stated that a prototypical example of a particular social group would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people.") (internal quotation marks, citations and footnote omitted); Iliev v. INS, 127 F3d 638, 642 (7th Cir. 1997); Ravindran v. INS, 976 F.2d 754 , 761 (1st Cir. 1992); Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986).

Moreover, the jurisprudence of many other countries has also relied upon Acosta. The British House of Lords, for example, drew on Acosta to recognize domestic violence as a basis for asylum for two Pakistani women. Islam (A.P.) v. Sec. of State for the Home Dep't, 2 App. Cas. 629 (H.L. 1999) (United Kingdom). Canada's Supreme Court has also cited Acosta with approval. Canada v. Ward [1993] 2 S.C.R. 689, 733.

The Third Circuit has applied Acosta to state explicitly that "women" are a particular social group. Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993). Some circuit courts, however, have at times given apparently conflicting, guidance. The Second Circuit has stated that broadly based characteristics such as youth and gender will not endow individuals with membership in a particular social group. Saleh v. U.S. Dep't of Justice, 962 F.2d 234, 240 (2nd Cir. 1992); Gomez v. INS, 947 F.2d 660, 664 (2nd Cir. 1991). In Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986), the court states that the "words particular and social which modify group indicate that the term does not encompass every broadly defined segment of the population" and rejects the proposed social group in that case of young, working class, urban males as too diverse and not the type of "cohesive, homogeneous group to which the term particular social group was

intended to apply." In Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994), the court rejected the proposed group of Iranian women as overbroad.

To best understand the decisions that discuss "overbreadth," and their relevance to social group analysis in general, it is critical to consider the fact patterns they addressed. These decisions deal with attempts to define social groups through characteristics that do not accurately identify the reasons why the persecutors seek to harm the victims. Because of this, the applicants could not establish that the harm they feared was on account of their membership in the groups they asserted. The fact that these claims would have failed on other elements of the refugee definition has colored the analysis of whether the social group is cognizable. It is in that context that the groups were found to be overbroad.

These decisions should not be read to mean that a group must be small in order to qualify as a particular social group. Rather, the best interpretation of these cases is that a social group is "overbroad" if it is broadly defined by general traits that are not the specific characteristic that is targeted by the persecutors. For example, as stated in Fatin, "women" could constitute a particular social group. As noted below, a group defined in this way would be "overbroad" in the case at hand, however, because it is defined by reference to a trait that is broader than the trait targeted by the persecutor.

Further, some of the language relating to "overbreadth" in these decisions appears to result from the combination of other elements of the refugee definition. In Safaie, for example, the court states that "this category is overbroad, because no fact finder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender." Safaie, 25 F.3d 636. This reasoning erroneously imports the well-founded fear standard, a separate element of the refugee definition, into the analysis of whether a particular

social group exists. The confusion of these elements in the social group analysis results in an incorrect and misleading conclusion. There is no requirement that all those who possess a protected characteristic have a well-founded fear in order for the characteristic to qualify as a protected one. Such reasoning yields anomalous results. Clearly, not all Catholics are at risk of persecution, but Catholicism is undoubtedly a religion.

The British House of Lords addressed reasoning like that in Safaie in the context of particular social group claims in Shah and Islam , where it granted asylum to two women who feared domestic violence in Pakistan. Counsel for the Secretary of State had argued that Pakistani women were not a particular social group because some Pakistani women were not persecuted. Lord Steyn rejected this argument, pointing out that, in the case of a woman who is not persecuted,

> [T]here will be no well-founded fear of persecution and the claim to refugee status must fail. But that is no answer to treating women in Pakistan as a relevant social group.... Historically, under even the most brutal and repressive regimes some individuals in targeted groups have been able to avoid persecution. Nazi Germany, Stalinist Russia and other examples spring to mind. To treat this factor as negativing a Convention ground under Article 1A(2) would drive a juggernaut through the Convention.

In addition to the varied guidance offered in these cases, the courts have articulated various other approaches to determining what qualifies as a particular social group. The Ninth Circuit, for example, where Matter of R-A- arose, has stated that "the phrase 'particular social group' implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest," and that "the existence of a voluntary associational relationship among the purported members" is "of central concern." Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986).[7] Some circuits have adopted these factors, Safaie, 25 F.3d at 640, while

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[7] Applying this reasoning in Matter of R-A-, the Board found that the social group presented by the applicant lacked this kind of common impulse or interest or voluntary associational relationship.

other circuits and the Board have decided that a particular social group may exist without reference to these factors. See, e.g., Fatin, 12 F.3d at 1240; Matter of Toboso-Alfonso, Int. Dec.3222 (BIA 1990) (Cuban homosexuals are a particular social group); Matter of Kasinga, Interim Decision 3278 (BIA 1996) (young women who belong to specific Togolese tribe and who oppose female genital mutilation are a particular social group).

The Ninth Circuit's decision in Hernandez-Montiel v. INS, 225 F.3d 1084, 1092-93 (9th Cir. 2000), has further complicated this issue. In Hernandez-Montiel, the Ninth Circuit stated that Sanchez-Trujillo should be interpreted as consistent with Acosta, and that the voluntary associational test is an alternative means for establishing the existence of a particular social group. While purporting to support consistency with Acosta, Sanchez-Trujillo could thus be read as diluting the requirement that all particular social group claims must be based upon an immutable characteristic. Cf. Lwin v. INS, 144 F.3d 505, 512 (7th Cir. 1998) (noting that "read literally, [Sanchez-Trujillo] *conflicts* with Acosta's immutability requirement.") (emphasis added).

The Board in Matter of R-A- set out several new factors to consider when determining whether a particular social group exists, in addition to the Acosta requirement of a shared immutable characteristic. These are: 1) whether the group is identified by the applicant's society as a subdivision of society and 2) whether the shared trait is important within the society, such that it is more likely that a distinction will be drawn in the society between those who share the trait and those who do not. The Board found that the group "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination", as formulated by the Immigration Judge, was not characterized by either of these factors.

Instead, however, a group defined as "married women in Guatemala who are unable to leave the relationship" would qualify as a particular social group under these Board factors. Significant evidence was presented in Matter of R-A- that is relevant to these factors. For example, the applicant testified that the police did not respond to her calls for help, and that, when she appeared before a judge, he told her that he would not interfere in domestic disputes. Further, the Board's decision characterizes documentary country conditions evidence as indicating that "Guatemalan society still tends to view domestic violence as a family problem." This evidence may reflect a societal view that the status of a wife places a woman into a segment of society that will not be accorded protection from harm inflicted by a spouse. In this light, this social status appears to be exactly the kind of "important" characteristic that results in a significant "distinction" being drawn with respect to a "recognized segment of society" in terms of who will receive protection from serious physical harm.

Clearly, the presence of these "factors" may correlate with the existence of a particular social group in a given case, as in fact they do here. In many cases, these social perceptions may provide evidence of the immutability or fundamentality of a characteristic asserted to define a social group. Thus, they may be indicators that a social group exists. The Board's decision, however, while naming them as "factors," finds that a particular social group does not exist because the Board has concluded that this kind of social perceptions evidence is not present in this case. Thus, the Board applies these "factors" as requirements, without relating them in any way to the Acosta immutable characteristic standard. This departs from the sound doctrine the Board established nearly 20 years ago in Acosta, and there is no reason for such a departure. Acosta has been widely followed, not only domestically, but also internationally. The respondent's claim, accordingly, should be examined under the Acosta standard.

2. The social group in this case is "married women in Guatemala who are unable to leave the relationship"

In this case, the Board addressed the Immigration Judge's articulation of the particular social group as "Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination." DHS agrees that the immigration judge's articulation does not identify a cognizable social group. Alvarado, however, advanced several formulations of the characteristic defining the social group in this case, including her status as a married woman. In order to engage in a rigorous, correct analysis, the government must identify the most appropriate social group formulation for this and similar cases. Moreover, given the long history and high profile of this case, to decide it without addressing the best social group articulation would exacerbate the confusion and uncertainty surrounding the legal standards that govern these kinds of cases.

The particular kind of group characteristic that qualifies as a shared immutable characteristic, such that its members form a particular social group, must be determined on a case-by-case basis. See Acosta, 19 I&N Dec. at 233; see also Islam (A.P.) v. Sec. of State for the Home Dep't, supra, (Lord Steyn) (explaining that the "principal question of law[,] . . . whether the appellants are members of a particular social group . . . can only be considered against a close and particular focus on the facts of the case.") .[8] Whether an individual is a member of a particular social group is a question of fact. Hernandez-Montiel, 225 F.3d at 1091.

The social group in this case is best defined in light of the evidence that Alvarado's husband believes that women should occupy a subordinate position within a marital or intimate relationship, that Alvarado must remain in this subordinate position in the relationship, that abuse of women within such a relationship can therefore be tolerated, and that social

[8] While international law "is not binding on the Attorney General, the BIA, or the United States courts[,]" it "may be a useful interpretative aid." See INS v. Aguirre-Aguirre, 526 U.S. 415, 427-28 (1999).

expectations in Guatemala reinforce this view. A group defined as "married women in Guatemala who are unable to leave the relationship" meets the requirements for a particular social group and accurately identifies the reason why the persecutor chose his wife as his victim.

In defining the particular social group, we must first identify the specific characteristic that the persecutor targets in choosing his victim. It seems clear that an integral part of the answer to this inquiry hinges on the status she acquired when she entered into the marital relationship. The evidence of record shows that Alvarado's husband abuses her because she is his wife. Although Alvarado suggested a particular social group formulation defined by gender alone, the evidence does not clearly support a conclusion that her husband targeted her because she was a woman. Certainly Alvarado's status as a wife is intricately linked with her gender, but to define the social group broadly as "women" ignores the evidence that a primary animus for violence arises from the abuser's perception of the subordinate status his wife occupies within the domestic relationship. In other words, although Osorio's belief that women generally occupy a low social status may play a role in his perception that he can abuse his wife, equally important to the dynamic is his perception that subordination is created through the marital bond. Osorio's belief that Alvarado cannot leave the relationship also reinforces his confidence that he may abuse her without interference or reprisal. Further, social expectations in Guatemala do little to disabuse Osorio of his views in this regard, which in turn bolsters his belief that he has the right to abuse Alvarado. These factors all work in concert to form the particular social group in this case. It would, therefore, be inaccurate to say that the social group is broadly defined by gender, by the marital relationship, by her inability to leave the relationship, or by Guatemalan nationality. Rather, it is the space occupied by the intersection of these factors – married women in Guatemala who are unable to leave the relationship – that is the targeted characteristic.

DHS believes that there are circumstances in which an applicant's marital status is immutable for purposes of particular social group analysis. For many individuals, marital status is an integral and unchangeable aspect of their religious and moral identity. For example, many Catholics believe that marriage is a sacrament that cannot be dissolved. While such an individual may physically separate from a spouse to avoid abuse, dissolution of the marriage itself would be contrary to deeply held beliefs. Further, even accepting the premise that one should be required to change marital status to avoid persecution, there may be circumstances in which it would be impossible to do so, such that the characteristic would be immutable for that reason. This would be the case, for example, if a woman could not reasonably be expected to divorce because of religious, cultural, or legal constraints. It could also be the case if the abuser would not recognize a divorce or separation as ending the abuser's right to abuse the victim.

All asylum claims must be considered within the context of the social, political, and historical conditions of the country. In determining whether an applicant cannot change, or should not be expected to change, the shared characteristic, all relevant evidence should be considered including the applicant's individual circumstances and country conditions information about the applicant's society.

3. Alvarado's marital status is an immutable characteristic and she is a member of a particular social group of "married women in Guatemala who are unable to leave the relationship"

The threshold question at issue in this case is whether Alvarado's marital relationship is immutable. Can she reasonably be expected to divorce, or are there religious, cultural, legal, or circumstantial constraints that would render divorce an unreasonable expectation? The applicant's testimony clearly establishes that Alvarado's marital status is immutable.

Alvarado testified that Guatemalan practice will not allow a woman to obtain a divorce without her husband's permission and that, because Osorio would not consent, she could not divorce him. Immigration Judge's Decision p. 4. Alvarado testified that she tried to leave Osorio several times, but each time he came for her, and her family could not let her stay because in Guatemalan culture a woman's place is with her husband. Under direct examination, Alvarado's expert witness testified that marriage "[is] a sacred issue. You have to . . . support your marriage for all your life and need to follow your husband . . . . You need to do what your husband say . . . whatever your husband ask, he has the right to do it and ... the marriage is almost one obligation that you . . . have for life, for all your life. You cannot get [out] of it and you are alone with your husband and this is your new family." Tr. at 100. Likewise, Alvarado provided a sworn affidavit in which she states, "In Guatemala, when you marry, it is permanent." Exhibit 2a at12. This evidence underscores the immutability of Alvarado's marital status in Guatemala.

Furthermore, the evidence indicates that, even if divorce is legally and culturally acceptable in Guatemala, legal separation would have no effect on Osorio's perceptions of authority and control over Alvarado. Since 1993, U.S. asylum law has explicitly extended the doctrine of imputation, first articulated in political opinion cases, to the other grounds for asylum. Under this doctrine, an applicant may establish persecution on account of a protected ground if he or she can show that the persecutor was or is inclined to persecute because the persecutor perceives the applicant to possess a protected characteristic, even if the applicant does not in fact possess that characteristic. See, Grover Joseph Rees III, INS General Counsel, Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion, Memorandum to Jan Ting, Acting Director, Office of International Affairs (January 19, 1993), p. 12; see also, Matter

of S-P-, 21 I&N Dec. 486 (BIA 1996); Matter of T-M-B-, 21 I&N Dec. 775 (BIA 1997), overruled on other grounds sub nom. Borja v. INS, 175 F.3d 732 (9th Cir. 1999) (en banc).[9] Recently, the Third Circuit has confirmed that "persecution on account of membership in a social group, as defined in INA §§ 101(a)(42)(A) and 241(b)(3), includes what the persecutor perceives to be the applicant's membership in a social group." Amanfi v. Ashcroft, 328 F.3d 719, 730 (3d Cir. 2003).

The significance of imputation by private individuals is not specific or limited to the context of domestic violence. For example, Jewish individuals from the former Soviet Union subject to physical violence and threats by private actors who perceived them as being Jewish have been found to have experienced past persecution on account of religion. Matter of O-Z- & I-Z-, 22 I&N Dec. 23 (BIA 1998). Significantly, that decision does not hinge upon, and makes no reference to, any religious activities engaged in by the respondents. Id. at 24. Because the persecutors perceived them as being Jewish, even if they were no longer practicing their religion, the persecution they experienced was on account of their being Jewish.

Alvarado's Affidavit states that Osorio has told her that she can not leave him, or that "you [she] will suffer much worse than what I have done to you [her] so far." Exhibit 2a at14. Likewise, Osorio has told her "[i]f you ever try to leave, I will come find you. And when I find you, I could kill you, but I'm not going to do that. I will break your legs. I will cripple you so that you will be in a wheel chair for the rest of your life. I will mark your face so it will be scarred forever, it will be twisted and deformed." Id. Other times he told her that, if she ever left him, he would find her and kill her. Id. Alvarado, in commenting upon her impressions of Osorio's intent, stated "even if I wanted to live my life alone, he would not let me. I would not

[9] Consistent with this long-standing approach, the proposed social group rule contains language to codify this existing administrative interpretation that the doctrine of imputation extends to protected grounds other than political opinion. 65 Fed. Reg. 76588, 76592 (Dec. 7, 2000).

be free to go anywhere; he would track me down. With his connections in the military and security he would find me. He found me before when I tried to move away; he would again. And I know that, once he found me, he would beat me worse than ever before for having left him." Id. Similarly, Alvarado testified that Osorio told her "you can't hide, even if you are buried under ground, you can't hide from me. I don't care what you do, you can't get away. Go ahead, try to disappear, and I will cut off your legs so you can't get away any more." Exhibit 8.

This evidence shows that Osorio views the marital relationship as being immutable, and would continue to view her as his wife, regardless of whether or not Alvarado obtains a legal divorce. Therefore, even if divorced, Osorio would impute a social group status upon Alvarado, thus pulling her under the protection of the Convention in the same way that imputed political opinion is a recognized as a basis for asylum. See, e.g., Sangha v. INS, 103 F.3d 1482, 1489 (9th Cir. 1997).

From the foregoing reasoning, it follows that Alvarado is a member of a particular social group of "married women in Guatemala who are unable to leave the relationship."

D. The "on account of" requirement

1. Background on nexus analysis in particular social group cases

The requirement that persecution be "on account of" a protected characteristic, often called the "nexus" requirement, is a separate analytical element of the refugee definition. Elias-Zacarias, 502 U.S. at 482-83. Determining the motivation for harm inflicted within the context of a domestic relationship or of cultural rites like FGM can pose novel challenges for fact finders. Our adjudicative process has significant experience with assessing the motivations of persecutors in claims based on political or religious opinions, and the case-based conventions for analyzing motivations have developed to address such traditional fact patterns. See, e.g.,

Baballah v. Ashcroft, 335 F.3d 981, 991 (9th Cir. 2003) ("These standards mean that in order for Baballah to meet the 'on account of' prong, he only is required to provide some evidence that in persecuting him, the Israeli Marines were motivated by ethnicity, religion, or the fact that Baballah was the child of a religious and ethnic intermarriage.") (footnote omitted); Borja v. INS, 175 F.3d 732, 736 (9th Cir. 1999) (en banc) (An applicant for asylum need not show conclusively why persecution occurred in the past or is likely to occur in the future. However, the applicant must produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or implied protected ground.") (citations omitted); Osorio v. INS, 18 F.3d 1017, 1029 (2d Cir. 1994) ("The plain meaning of the phrase 'persecution on account of the victim's political opinion,' does not mean persecution solely on account of the victim's political opinion. That is, the conclusion that a cause of persecution is economic does not necessarily imply that there cannot exist other causes of the persecution.").

Little guidance exists, however, on analyzing the "on account of" element in claims involving cultural practices and perspectives not directly related to politics or religion. The Board in Matter of Kasinga, 21 I&N Dec. at 366-67, determined that the FGM the applicant in that case feared was on account of her membership in a social group, but the decision contains little reasoning for the determination. Id. The Board's analysis in Matter of R-A- included significant new reasoning on the nexus element. In particular, the Board considered the lack of evidence that Alvarado's husband would seek to harm other group members as indicating that he was not motivated by group membership. This reasoning is fundamentally flawed, because, as explained below, the Board's reasoning could be construed to foreclose the possibility of satisfying the "on account of" requirement when the evidence shows that the persecutor harms

the victim because of a protected characteristic, but does not seek to harm others who share that characteristic.

2. Statement of the law

The Supreme Court has provided a clear basic standard for determining when persecution is "on account of" an asserted ground. In Elias-Zacarias, the Court required that the applicant must provide some evidence, direct or circumstantial, that the persecutor is motivated to persecute the victim because the victim possesses, or is believed to possess, one or more of the protected characteristics in the refugee definition. 502 U.S. at 483-84. While "an applicant does not bear the unreasonable burden of establishing the exact motivation of a 'persecutor where different reasons for actions are possible,' an applicant must establish "facts on which a reasonable person would fear that the danger arises on account of" one of the five protected grounds. Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988); S-P-, 21 I&N Dec. 486.

Under long-standing principles of refugee law, it is not necessary for an applicant to show that his possession of a protected characteristic is the only reason motivating the persecutor to harm the victim. Administrative and federal court precedents recognize that a persecutor may have mixed motives, and that the "on account of" element is satisfied if the persecutor acts "at least in part" because of a protected characteristic. See, e.g., T-M-B-, 21 I&N Dec. 775. As noted above, the Board determined that Alvarado's abuse was not "on account of" her membership in any group in large part because there was no indication that the abuser would harm any other group member, whether the group be defined as "women," "Guatemalan women," or "Guatemalan wives." The Board's reasoning on this matter is flawed, imposes an additional requirement previously unseen in nexus analysis, and is inconsistent with the analysis

applied in more traditional asylum claims. DHS therefore rejects the Board's treatment of this issue in favor of the Supreme Court's sound reasoning in Elias-Zacarias, 502 U.S. at 482.

As an evidentiary matter, it is certainly reasonable to expect that a person who is motivated to harm a victim because of a characteristic the victim shares with others would often be prone also to harm others who share the targeted characteristic. But evidence on this point should not be required in all cases in order for the applicant to satisfy the "on account of" requirement.

The Board's reasoning on this point is fundamentally flawed and would yield anomalous results if applied to other types of cases. In some cases, a persecutor may in fact target an individual victim because of a characteristic the victim shares with others, even though the persecutor does not act against others who possess the same characteristic. For example, in a hypothetical slave-owning society, a slave owner who freely beats his own slave might not have the opportunity or inclination to beat his neighbor's slave. It would nevertheless be reasonable to conclude that the beating is motivated by the victim's status as a slave. Other slaves in the society share the victim's status as a slave. From these premises follows the conclusion that the abused slave is a member of a group, who is at risk of being beaten because of the group members' shared characteristic of being slaves.[10]

[10] It might be argued that in this slavery example, the principle form of persecution is the condition of slavery itself, which in turn may be imposed on the victim because of some other characteristic, such as race. Thus, the condition of slavery may constitute persecution on account of race. But this would not undercut the conclusion that the victim is at risk of beating because of the shared characteristic of being a slave. The Supreme Court in Elias-Zacarias, supra, established that the "on account of" element of the refugee definition is a separate analytical component, and must be assessed apart from questions about whether the harm at issue amounts to persecution or whether the characteristic motivating the persecutor is a protected one. 502 U.S. at 482. Once a particular type of harm is determined to amount to persecution, we must have the ability to analyze accurately the motive for that harm. In the slavery example, sustained physical abuse of the slave undoubtedly could constitute persecution independently of the condition of slavery. It is therefore necessary for our analytical framework to have the capacity to assess the motives for the abuse itself.

Similarly, in some cases involving domestic violence it may be accurate to conclude that the victim is harmed because of her status in the domestic relationship. This may be a status shared by others, some of whom may also be at risk on account of their shared characteristic. Thus, it may be possible to conclude that the harm is "on account of" the shared trait, even though social limitations and other factors result in the abuser having the opportunity, and indeed the inclination, to harm only one victim.

Factors other than the persecutor's perception of the victim's characteristic can affect inclination and opportunity to persecute in any asylum claim. Often, this dynamic plays out unseen in other kinds of cases and poses no barrier to finding that the persecution is on account of the protected ground. See, e.g., S-A-, 22 I&N Dec. at 1336 (Islamic father persecuted his daughter on account of her more liberal Islamic beliefs, even though there was no evidence that he would persecute liberal Islamic daughters of other fathers.) It is unjustified to single out particular social group domestic violence cases, identify these other factors, and conclude that they preclude a finding that the persecution is on account of the asserted ground.

Thus, in certain cases involving domestic violence, an applicant may be able to establish that the abuser is motivated to inflict harm because of the victim's status in a domestic relationship. As in every asylum claim, of course, it is the applicant's burden to establish that the persecutor is motivated to act against her because of her possession or perceived possession of a protected characteristic. See Elias-Zacarias, 502 U.S. at 482-83. Proof of the persecutor's motive can be provided through direct or circumstantial evidence. See id. at 483-84.

In the domestic violence context, evidence that the abuser uses violence to enforce power and control over the applicant because of the social status that the applicant has within the family relationship is highly relevant to determining the persecutor's motive. This includes any direct

evidence about the abuser's own actions and motives, as well as any circumstantial evidence that such patterns of violence are (1) supported by the legal system or social norms in the country in question, and (2) reflect a prevalent belief within society, or within relevant segments of society, that cannot be deduced simply by evidence of random acts within that society. Such circumstantial evidence, in addition to direct evidence regarding the abuser's statements or actions, may support a determination that the abuser believes he has the authority to abuse and control the victim "on account of" the victim's status in the relationship.[11]

3. Alvarado fears abuse on account of her membership in a particular social group of "married women in Guatemala who are unable to leave the relationship"

DHS believes that Alvarado has established that the severe and sustained nature of her husband's violence was motivated by her status in the marital relationship, which she is unable to leave. The record has numerous examples of Osorio's motives in choosing Alvarado as the victim of his abuse. For example, when he abused her, he would say "I can do it any time I want. You're my woman, and I can do whatever I want." Exhibit 2a at 5. Similarly, on one occasion when Osorio was sodomizing Alvarado, he stated, "You're my woman, you do what I say." Exhibit 2a at 6. Further, when he wanted something he couldn't find, he would strike her head against the furniture. When she asked him why he did this, he replied "I can do it if I want to." Exhibit 2a at 7. These statements provide direct evidence that Osorio's motivation was rooted, at least in part, in his belief that the marital relationship bestows upon him the inherent authority to abuse his spouse. In its decision, the Board in fact concluded that "the record

[11] Evidence about social attitudes in this context may include some of the same facts that would be considered when determining whether the government is unable or unwilling to protect against persecution. Here, however, social attitudes would be considered as circumstantial evidence of the persecutor's state of mind in order to determine whether he chooses his victim because she possesses a protected characteristic. This nexus determination is a separate element from the state action requirement, and should not be confused with it. While facts relevant to the nexus determination in some cases may also be relevant to the state action determination, standards governing state action should not be imported into this inquiry.

strongly indicates that he would have abused any woman ... to whom he was married," that "[t]here is little doubt that the respondent's spouse believed that married women should be subservient to their own husbands," and that "the husband's focus was on the respondent because she was his wife." R-A-, supra, at 14.[12]

There is also evidence showing that Osorio's view that Alvarado could not leave the relationship played a key role in his choice of her as his victim. Alvarado repeatedly testified that if she tried to leave the relationship, Osorio would find her and kill or maim her. Osorio in fact told her "you can't hide, even if you are buried underground, you can't hide from me. I don't care what you do, you can't get away. Go ahead, try to disappear, and I will cut off your legs so you can't get away anymore." Exhibit 8. Alvarado's inability to escape the relationship influences Osorio's motivation in harming her because he knows that he can harm her with impunity, and that he can continue to do so regardless of any action she might take – she cannot leave the relationship.

In the face of such strong direct evidence, further circumstantial evidence about Osorio's motivation is not necessary to meet the "on account of" requirement. Indeed, under BIA precedent, Alvarado does not even "bear the burden of establishing the exact motivation of [the] 'persecutor' ...[but] does bear the burden of establishing facts on which a reasonable person would fear that the danger arises on account of [her] ... particular social group." Fuentes, 19 I&N Dec. at 662. Such facts have clearly been established here. To the extent that the record

[12] The Board concluded that Osorio abused Alvarado because he was a cruel and violent man. Matter of R-A-, Int. Dec. 3403 at 20. This is undoubtedly true. Many individuals who inflict harm serious enough to constitute persecution are cruel and violent. But when assessing whether harm is inflicted on account of a protected characteristic under refugee law, determining that the persecutor is a cruel and violent person does not answer the question. See Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997); Kasinga, 21 I&N Dec. at 365. Rather, the question is answered by deciding why the persecutor chooses this victim as the recipient of harm. If the persecutor chooses the victim because of the victim's possession of a protected characteristic, the nexus requirement is satisfied. Elias-Zacarias, 502 U.S. at 482-83. The fact that Hitler was undoubtedly a cruel and violent person, for example, does not undermine the conclusion that, in many case, he chose his victims because they possessed characteristics that are protected under the refugee definition.

indicates that the legal and social norms of Guatemala support Osorio's belief in this regard, however, this is additional circumstantial evidence of his motivation. The Board, for example, cited record evidence that "Guatemalan society still tends to view domestic violence as a family matter." Given the direct and circumstantial evidence of Osorio's motivations in this case, DHS argues that the nexus between the abuse Alvarado suffered and a Convention protected ground has been established.

E. The state action requirement

1. Statement of the law

It is a long-standing requirement of asylum law that the harm an applicant has suffered or fears must be inflicted by either the government of the home country or by an entity the government is unable or unwilling to control. See, e.g., Borja, 175 F.3d at 735 n.1 ("The NPA is not the government of the Philippines. Nevertheless, persecution cognizable under the INA can emanate from sections of the population that do not accept the laws of the country at issue, sections that the government of that country is either unable or unwilling to control.") (citations omitted); Adebisi v. INS, 952 F.2d 910, 913-14 (5th Cir. 1992); Singh v. INS, 94 F.3d 1353, 1359 (9th Cir. 1996) ("Discrimination, harassment, and violence by groups that the government is unwilling or unable to control can also constitute persecution"); Montoya-Ulloa v. INS, 79 F.3d 930, 931 n.1 (9th Cir. 1996); Sotelo-Aquije v. Slattery, 17 F.3d 33, 37-38 (2d Cir. 1994); Llana-Castellon, 16 F.3d at 1097-98 ("[T]he BIA failed to acknowledge that the persecution of which an applicant for asylum complains need not emanate from the present government of a foreign nation. . . . The BIA did not consider whether the Sandinistas, now in opposition to the current government, constitute an agency that the government is unwilling or unable to control.");

Matter of Villalta, 20 I&N Dec. 142, 147 (BIA 1990). Both the Immigration Judge and the Board determined that Alvarado has met this requirement and DHS agrees.

Of course, no government is able to guarantee the safety of each of its citizens at all times and this is not the standard for determining that a government is "unable or unwilling to control" the infliction of harm and suffering. This interpretation of the "unable or unwilling to control" standard is eloquently developed in a recent British House of Lords decision.

> The standard to be applied [in non-state actor cases] is . . . not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather, it is a practical standard, which takes proper account of the duty which the state owes to all its own nationals. . . . [I]t is axiomatic that we live in an imperfect world. Certain levels of ill-treatment may still occur even if steps to prevent this are taken by the state to which we look for our protection.

Horvath v. Sec. of State for the Home Dept., 3 WLR 379 (H.L. 2000) (United Kingdom). Rather, the decision-maker should consider whether the government takes reasonably effective steps to control the infliction of harm or suffering and whether the applicant has reasonable access to the state protection that exists.

Administrative and judicial caselaw outlines various types of evidence that may be considered on this issue. An applicant can establish the requisite state action, for example, by showing a pattern of government unresponsiveness. Mgoian v. INS, 184 F.3d 1029, 1036-37 (9th Cir. 1999). Of course, an applicant can also meet his burden on this issue by showing actual government complicity in the persecution. Korablina v. INS, 158 F.3d 1038, 1045 (9th Cir. 1998). Any attempts by the applicant to obtain protection from government officials, and the government response or lack thereof, are also highly relevant. Surita v. INS, 95 F.3d 814, 819-20 (9th Cir. 1998) (finding persecution where the police refused to respond to the applicant's request for assistance or provide a reasonable explanation for their failure to respond); Singh v. INS, 134 F.3d 962, 968 (9th Cir. 1998) (holding that the applicant failed to establish persecution,

in part because the police responded to her call). In S-A-, the Board found that the applicant met the state action requirement even though she never sought government protection because the evidence showed that any attempts to seek such protection would have been futile and potentially dangerous. 22 I&N Dec. 1328. In other decisions, the Board has accorded considerable weight to evidence of government responses to persecution by non-state actors. Matter of V-T-S-, 21 I&N Dec. 792 (applicant failed to establish that the government was unable or unwilling to protect when evidence showed that the government mounted massive rescue efforts to find kidnapped family members); Matter of O-Z- I-Z-, 22 I&N Dec. at 24 (government was unable or unwilling to protect applicant from anti-Semitic violence where applicant reported at least three incidents to the Ukrainian government and government took no action beyond writing a report).

2. The government of Guatemala is unable or unwilling to protect Alvarado

Both the Immigration Judge and the Board determined that Alvarado "adequately established on this record that she was unable to avail herself of the protection of the government of Guatemala in connection with the abuse inflicted by her husband." Matter of R-A- at 8. DHS agrees with this assessment.

Alvarado presented evidence demonstrating that the state was unwilling to prevent the persecution she received at the hands of her husband. She unsuccessfully sought police protection at least five times. Alvarado testified, "When I tried to get help from them [the police], they told me that they would not get involved, that I should take care of it at home." Exhibit 2a at 10. Even after Alvarado filed a formal complaint, the police did nothing. Id. Later, after three more incidents of abuse, the police issued citations to appear against Osorio. When Osorio failed to appear, however, the police failed to take any action against him. Id. On

one instance, a complaint was filed with a judge. The judge, however, proved equally unresponsive, explicitly indicating that he would not interfere in domestic disputes. Tr. at 42. Osorio was never arrested or placed on trial for his actions. Exhibit 2a at 11. In a separate incident, Alvarado fled to a neighbor's house and called the police to report that she was being beaten. The police took the call but never responded to the house. This pattern of state inaction demonstrates that, while not active participants in the abuse, the state authorities were unwilling to stop Osorio's persecution of Alvarado.

In O-Z- & I-Z-, the Board held that even where the Ukrainian government condemned anti-Semitism, its failure to enforce its own laws resulted in a lack of state protection for applicants who were victims of abuses by nationalist groups. In that case, the applicant reported at least three incidents of harm to the police, who made a report but failed to take other action. O-Z- & I-Z-, 22 I&N Dec. 23. The evidence of government unresponsiveness in O-Z- & I-Z- is similar to the evidence in this case, where Alvarado sought help from the police on at least five occasions, and from a judge on one occasion, all without success. Application to this case of the well-established reasoning in O-Z- & I-Z- should result in the same conclusion – that the government is unwilling or unable to protect Alvarado. This element of Alvarado's case has been established.

F. **Internal relocation**

1. Statement of the law

An "individual who can relocate safely within his home country ordinarily cannot qualify for asylum." INS v. Ventura, 537 U.S. 12, 18 (2002) (referencing 8 C.F.R. § 208.13(b)(1)(I)). Under governing regulations, asylum shall be denied if the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality and if it would,

under all the circumstances, be reasonable to expect the applicant to do so. 8 C.F.R. § 208.13(b)(1)(I)(B) (2003). In cases in which a non-state actor would inflict the persecution, and the applicant has not established past persecution, the burden lies with the applicant to show it would not be reasonable for her to relocate within her country. See id. § 208.13(b)(3); Cardenas, 294 F.3d at 1066. Where an asylum applicant has shown past persecution, the burden is placed on DHS to show that it would be reasonable for her to relocate within the country. See 8 C.F.R. § 208.13(b)(3)(i) (2003).

2. Alvarado could not reasonably avoid persecution by relocating within Guatemala

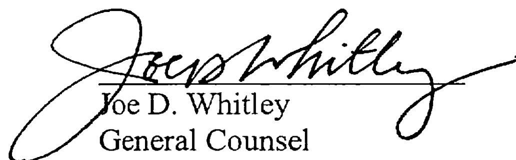
Irrespective of which party ultimately carries the burden on the question of internal relocation, the record shows that it would not be reasonable to expect that Alvarado could avoid persecution by relocating within Guatemala. The record contains persuasive evidence that Alvarado attempted to leave her home several times and that, each time, her husband sought her out and found her. A number of times, Alvarado left her husband and went to stay with family. On one occasion, she rented a room on the outskirts of town and told no one where she was. She was able to avoid her husband in this manner for about two months, but he then found her and inflicted some of the most atrocious abuse described in the record. Alvarado testified that because her husband was in the military and has military contacts, and because the military has a presence throughout the country, her husband will be able to find her no matter where she goes. This evidence is particularly compelling in light of the fact that Guatemala is a relatively small country geographically. Measuring only 108,890 square kilometers, Guatemala is smaller than the state of Tennessee. Alvarado has presented sufficient evidence to establish that she has no reasonable alternative to avoid persecution by relocating within Guatemala.

VII. CONCLUSION

For the foregoing reasons, Alvarado has established statutory eligibility for asylum. As explained above in Section I, DHS believes that the proposed rule governing certain issues often raised by particular social group cases should be finalized before the Attorney General issues a precedent decision in this case. Therefore, DHS asks the Attorney General to remand this case to the Board with instructions to grant asylum without an opinion. In the alternative, DHS asks the Attorney General to postpone issuing a precedent decision in this case until the rule is finalized. If the Attorney General chooses to issue a precedent decision in this case before the rule is finalized, DHS submits that under the analytical framework set out above, Alvarado merits asylum.

Dated: Feb. 19, 2004

Respectfully submitted,



Joe D. Whitley
General Counsel

CERTIFICATE OF SERVICE

I, the undersigned, declare:

That I am a citizen of the United States over the age of 18 years and not a party to the within-entitled action. I am an employee of the Department of Homeland Security and my business address is DEPT. of HOMELAND SECURITY, OFFICE of the GENERAL COUNSEL, WASHINGTON, DC 20528

That I served a true copy of the attached by placing said copy in an envelope, which was then sealed, and was on this day sent by U.S. Mail, full postage paid, addressed as follows:

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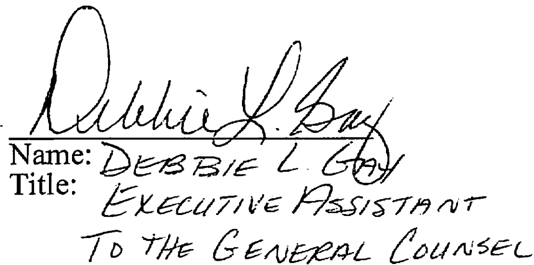
Executed on FEB. 19, 2004, in Washington, D.C.



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